

NO. 44117-9-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHELLY RENEAH FAIRMAN,

Appellant.

BRIEF OF RESPONDENT

**JASON LAURINE
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Deputy Prosecutor
for Respondent**

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I. ISSUES

1. Did the jury instruction for unwitting possession shift the burden of proof from the State to Ms. Fairman even though affirmative defenses must be proven by a preponderance of the evidence by the proponent of the defense?
2. Was it ineffective assistance of counsel for Fairman's trial counsel to not object to a jury instruction that he argued in closing?
3. Did the prosecution commit misconduct so flagrant, calculated, and ill-intentioned that there is a substantial likelihood it affected the jury verdict?

II. ANSWERS

1. No.
2. No.
3. No.

III. STATEMENT OF THE CASE

Shelly Fairman and Sarai Jones were arrested for shoplifting from Goodwill in Longview, Washington, on May 20, 2012. RP 67-68; 80-82. They were taken to the Cowlitz County Jail where an inventory search of their belongings took place. RP 82-94. RP 109-121.

Cowlitz County Corrections officer, Dave Crayne performed the search of Fairman's purse. RP 109-121. Inside the purse he found several packages of methamphetamine, a clear tube of marijuana, electronic scales, glass pipes, and over a \$1000 dollars in US currency.

Fairman was charged with possession with intent to deliver a controlled substance and, alternatively, possession of a controlled substance. She was also charged with possession of marijuana and theft in the third degree. CP 2.

At trial, the jury heard testimony from Dave Crayne, Longview Police Officers, Jordan Sanders and Corporal Tim Watson, Travis Ellis, Longview Police Department evidence clerk, Ron Cryderman, and Washington State Crime lab technician, Steven Reid.

Dave Crayne described Fairman's demeanor during the inventory search. She was anxious and jittery as he went through the inventory process. RP113-14.

Jordan Sanders took control of the items as they were removed from Fairman's purse. He observed both Fairman and Sarai Jones. Sarai Jones was present during the inventory and never claimed the items as her own. And Fairman did not appear shocked when they were removed. RP 94, 103-05. Because of the surfaces of the items he did not obtain fingerprints. RP 104-05.

Steven Reid and Ron Cryderman both testified regarding the substances found in Fairman's purse. Reid testified to the weight and substances found within 3 separate baggies. The substances were methamphetamine. RP 126-36. Mr. Cryderman testified that the substance found in a clear tube was marijuana. RP 136-41.

Corporal Watson described the sale and purchase of drugs. RP 148-182. He based his testimony on over 8 years on the drug task force. He described how methamphetamine is typically packaged for sale, the weights associated with street level sales, how people who typically purchase methamphetamine weight the package, not the substance. He testified that scales used by dealers will typically have residue on them, where, if they are scales owned by users they typically do not. He testified that he observed the scales taken from Fairman's purse and that they had a crystalline substance on them consistent with methamphetamine. He testified that the baggies were of a weight similar to street sales of an eight ball, and that the weights indicated someone was selling smaller quantities from them.

Sarai Jones testified at trial. RP 188-219. She claimed the items found in Fairman's purse were her items. She described the guilt she felt 3 weeks following their arrest and the reasons why she wanted to take responsibility. She described how she approached Fairman and how they

talked about what happened. However, when asked to describe where the items were placed in specific containers, she could not do so accurately. She also admitted to a conviction for a crime of dishonesty.

Defense counsel argued for the use of unwitting possession instruction, suggesting that enough evidence was presented to allow him to argue the defense. Over the State's objection, the trial court permitted its use. RP 223-24.

The State's first statement to the jury was: "So, we don't really have to prove much of anything." The State then continued:

"We know that the defendant possessed methamphetamine and we know that the defendant possessed marijuana. And that possession was done here in Cowlitz County, State of Washington. And it was done on May 20th, 2012. Pretty simple.

You've already heard that the substances found in 7A, 7B, and 7C all consisted of methamphetamine." RP 229.

The State continued to weave an argument until it got to the crux of proof. Here it argued:

"So, we know that she possessed methamphetamine. We know that she possessed marijuana. So, we've proven those two crimes here. The bigger issue, as I discussed with you guys yesterday in openings, was whether or not we were going to be able to prove possession with intent to deliver.

And here it comes down to we've got multiple baggies, we've got multiple substances, we've got a scale, and we've got a lot of cash--\$1000 worth of cash, which is probably about enough, as Tim Watson said, to go out and buy another ounce of methamphetamine. Between \$1000 and \$1200 is what it costs on the streets. All right, how do we know she's possessing with intent?" RP 235.

The State then described how the evidence presented suggested possession with intent. RP 235-40.

During its closing, the State also discussed Sarai Jones credibility and her ability to describe the evidence found in Fairman's purse and the development of her story over a period of time that included several interviews and statements. The State argued that:

"she couldn't describe [the methamphetamine] and that would be a particularly interesting fact to have if she was going to come in here and say that it was her meth. Why? Well, because it shows that she could identify it. And, as she said, she inventoried her purse, her glasses case before she took them out of there. She knew what was in there, yet she could not describe it. Two months later she says, well, it was a black cross.

Yeah, there was a black cross, and I'll guarantee you after three mnths there's certainly a conversation between the two of them that could say, hey, take a look at this evidence. The methamphetamine bag said black cross, it looks ike a black cross on there. That was it, it's all that she described. And then today she came in here and she said, well, there's number 1's on there and there's black crosses.

And this story has just grown." RP 233.

While Fairman's counsel did not object to any of these comments, he did address these arguments in his own closing argument and argued the inferences he took from the evidence presented to the jury. RP 240-60.

The jury convicted Fairman of the counts before them. RP 272-73. At sentencing, the alternative charge of unlawful possession of a controlled substance was vacated because Fairman was also convicted of the greater crime of unlawful possession of a controlled substance with the intent to deliver. RP 278.

IV. ARGUMENT

1. Because unwitting possession is an affirmative defense Fairman was required to prove the defense by a preponderance of the evidence.

Fairman first claims that the State shifted the burden of proof when an instruction for unwitting possession was provided to the jury. In her closing, Fairman made two arguments to the jury. First, that she possessed the methamphetamine but the possession was unwitting—that she did not know that she possessed methamphetamine. Next, she argued that because she did not know she possessed the methamphetamine she had no intent to deliver the methamphetamine. Anticipating these arguments, the State prepared and provided pattern jury instruction WPIC 52.01--the unwitting possession instruction. Over the State's objection, this instruction was

read to the jury in court instruction 13. The pattern jury instruction on unwitting possession provides:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in [his][her] possession] [or][did not know the nature of the substance].

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

Fairman now argues that the inclusion of jury instruction 13, the instruction that defined unwitting possession, is constitutional error because it relieved the State of its burden of proof.

Unwitting possession is a judicially-created affirmative defense that requires a defendant to prove by a preponderance of the evidence circumstances negating culpability that are uniquely within her knowledge and ability to establish. *State v. Knapp*, 54 Wash.App. 314, 317-22, 773 P.2d 134 (1989). Possession of a controlled substance is a strict liability offense. *State v. Deer*, 175 Wash.2d 725, 287 P.3d 539 (2012), citing *State v. Bradshaw*, 152 Wash.2d 528, 98 P.3d 1190 (2004). Its elements are simply possession of an identified controlled substance in the State of

Washington. Knowledge is not assumed within the term of possession. In fact, courts have specifically construed the statute not to include knowledge. *Bradshaw*, 152 Wash.2d at 537-38, 98 P.3d 1190, *citing State v. Cleppe*, 96 Wash.2d 373, 635 P.2d 45 (1981) *cert denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982).

While the State had the burden of proving the elements of unlawful possession of a controlled substance, Fairman had the burden of proving the affirmative defense of unwitting possession. That requirement does not improperly shift the burden of proof from the State to Fairman. *Bradshaw*, 152 Wash.2d at 538. Because Fairman asserted that she did not know the substance was in her possession she must prove that assertion by a preponderance of the evidence. *Id.* Consequently, the burden properly fell on her, because unwitting possession does not negate the fact of possession; it ameliorates the harshness of a strict liability crime. *Id.*

However, Fairman contends that the position of the instruction was misleading and, consequently, confused the jury to believe that the instruction was in regards to the primary charge of Possession with intent to deliver a controlled substance. However, this argument overlooks the first sentence in the unwitting possession instruction: “A person is not guilty of possession of a controlled substance if the possession is unwitting.” Instruction 13.

It is true that the court's instructions to the jury must accurately inform the jury of the relevant law and not be misleading. *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). In this case, the trial court accurately instructed the jury of the relevant law. It informed the jury within four separate instructions that the burden of proof rested on the State, and that burden was beyond a reasonable doubt. The jury was first instructed about the State's burden in Jury Instruction 4, then again in Instructions 9, 17, and 18. The only time the trial court instructed the jury otherwise was in Instruction 13, which clearly states the defense was specific for possession of a controlled substance.

Fairman's argument that the order in which the instructions were given mislead the jury also overlook the language in Jury Instruction 1. The trial court instructed the jury that:

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider these instructions as a whole. Instruction 1.

Fairman has failed to show how an instruction that provided to her a defense to a specific, strict liability crime permitted the jury to convict her unless she disproved her intent to deliver. Moreover, Fairman has

failed to show how the state shifted its burden of proof when it provided to her an instruction to a defense to a crime.

2. The failure of Fairman's trial counsel to object to the unwitting possession instruction was not ineffective counsel because it was argued as a defense in her case.

Fairman next claims that she received ineffective assistance of counsel because her defense counsel failed to preserve any instructional error that may have occurred. A claim of ineffective assistance is reviewed de novo. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995).

To establish ineffective assistance of counsel Fairman must show that her attorney's performance was deficient and the deficiency prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney's performance is deficient when it falls below an objective standard of reasonableness based on consideration of the circumstances. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). In order to show prejudice, Fairman is required to prove that there is a reasonable probability that, but for her attorney's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 11 Wash.2d 66, 72, 758 P.2d 982 (1988).

There is a strong presumption that counsel's performance was reasonable. *State v. Studd*, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999). Here, defense counsel's performance was reasonable. The jury instruction was not erroneous, nor was it improper for him to argue that Fairman did not know she had methamphetamine on her person.

The defense worked two ways. First, Fairman did not know she had methamphetamine on her person because her niece placed the methamphetamine in her purse without her knowledge. Consequently, she could not be guilty of possession of methamphetamine. Next, the defense suggested that if she did not know the methamphetamine was in her purse, she could not have reasonably had the intent to distribute the methamphetamine. This was a reasonable argument and valid defense given the evidence that came out at trial.

Fairman now hinges her argument on the fact defense counsel failed to propose a clarifying instruction for the affirmative defense. However, unwitting possession is not a defense to the crime of possession with intent to deliver, because that crime assumes the defendant knew she was in possession of the drugs. *State v. Sanders*, 66 Wash.App. 380, 390, 832 P.2d 1326 (1992). Again, the unwitting possession instruction indicates in the first and the second sentences that it is a defense to unlawful possess of a controlled substance only. Therefore, it was

unnecessary for defense counsel to propose a clarifying instruction to the jury when it was already manifestly clear.

Consequently, Fairman has failed to show the performance of her trial counsel was deficient. Because of this, there is no reasonable probability that, but for her trial counsel's deficient performance, the outcome of the trial would have been different. *Leavitt*, 11 Wash.2d at 72, 758 P.2d 982.

3. While not articulate, the comments made by the prosecution were not calculated to inflame the passions of the jury and were unlikely to affect the jury verdict.

Finally, Fairman claims the State committed prosecutorial misconduct based on three statements made during its closing argument. A court should review the prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). In other words, a court should review the statements in context of the entire case. *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wash.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements that are unsupported by

the evidence and prejudice the defendant. *State v. Jones*, 71 Wash.App. 798, 808, 863 P.2d 85 (1993), review denied, 124 Wash.2d 1018, 881 P.2d 254 (1994). Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial. *State v. Coles*, 28 Wash.App. 563, 573, 625 P.2d 713, review denied, 95 Wash.2d 1024 (1981).

Here, Fairman argues that the state committed misconduct when in its closing statement to the jury it inartfully addressed the issue of unwitting possession. She further claims that the State committed misconduct when, during a portion of its closing argument regarding the credibility of defense witness, Sarai Jones, described Sarai as Fairman's "so called niece." Finally, Fairman claims misconduct occurred when the State argued that it would guarantee a conversation took place between Fairman and her niece, Sarai Jones.

Fairman must show that the conduct of the prosecutor in her case was improper and prejudiced her right to a fair trial. *Dhaliwal*, 150 Wash.2d at 578, 79 P.3d 432. She establishes prejudice when she can show there were a substantial likelihood the instances of alleged misconduct affected the jury's verdict. *Id.* quoting *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct 2568, 135 L.Ed.2d 1084 (1996) Not only has Fairman failed to show

that the State's arguments were calculated to inflame the passions and prejudices of the jury, *State v. Brett*, 126 Wash.2d 136, 179, 892 P.2d 29 (1995), but she has also failed to show that the alleged instances of misconduct affected the jury's verdict.

There was a conversation that took place between Fairman and Sarai Jones. Sarai Jones admitted she had spoken to Fairman three weeks after their arrest, that she had felt bad about the situation, and that she wanted to make it right even after staying silent in the jail booking area as Fairman was being investigated for possession of a controlled substance. The State made a reasonable inference from the evidence that came in at trial. The inference did not suggest other, more condemning evidence existed, nor did it alter the evidence that was entered.

In *State v. Glassman*, 175 Wash.2d 696, 706, 286 P.3d 673 (2012), the Court held that the State intentionally altered the booking photos to influence the jury's assessment of the defendant's guilt and veracity.. Unlike in *Glassman*, where the prosecutor intentionally presented the jury copies of the defendant's modified, booking photos, here the State merely made reasonable inferences based on the evidence that had been entered through testimony.

In the second instance, when the State made the comment regarding the relationship between Fairman and Sarai Jones, the statement

was made during a portion of the closing argument that focused on Sarai Jones's credibility. Nothing the State said suggested there was evidence outside of court that could prove Fairman and Jones were not related. Moreover, nothing about that statement could rise to level of saying repeatedly "guilty, guilty, guilty" or "liar, liar, liar." While it can be considered a misjudgment, inarticulate even, it cannot be considered ill-intentioned or calculated to inflame the passions of the jury.

Finally, it is without question the State did not use artful language when it first addressed the jury in closing argument. However, the State's argument did immediately move on to show how it proved the elements of the crimes charged. Indeed, the State's next comments were that it had shown how Fairman possessed methamphetamine in Cowlitz County, and in the State of Washington. The remaining portions of its argument were centered on the primary issues in dispute. The State addressed whether or not Fairman possessed the controlled substance unwittingly, and then the State addressed whether or not Fairman possessed a controlled substance with the intent to deliver.

Because Fairman argued unwitting possession, she effectively admits that she possessed a controlled substance. This is what the State attempted to point out in its initial statement to the jury. If the State's intention was to say it did not have to prove anything it would have sat

down following its first comment. But clearly that was not the intention, given the efforts it made to show how it proved Fairman possessed the controlled substance by enumerating and highlighting the circumstances that suggested she possessed it with the intent to deliver.

Taken together, these instances do not rise to a level necessary to inflame the prejudices of the jury. They were neither calculated to do so, nor would they suggest that other evidence was available yet not provided to the jury to consider. Fairman has not shown how these alleged instances of misconduct have actually affected the jury's decision. Consequently, she has not carried the burden in this issue.

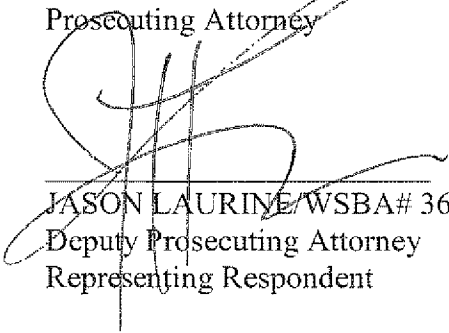
V. CONCLUSION

For the above reasons, the State respectfully requests the court to deny Fairman's request for a new trial.

Respectfully submitted this 15 day of July, 2013.

SUSAN I. BAUR, WSB# 15221
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By:


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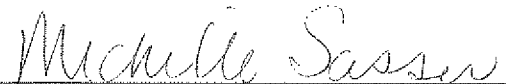
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 16th 2013.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

July 16, 2013 - 11:02 AM

Transmittal Letter

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